Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

No. 92-533

IN THE
Supreme Court of the United States

October Term, 1992

NICOLE ADAMS, et al.
Petitioners,

v.

CHILDREN'S MERCY HOSPITAL, et al.
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

Roxanne Barton Conlin, Esq.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500

President, Association of Trial Lawyers of America

Jeffrey Robert White, Esq.*
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500

Attorney for Amicus Curiae
**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. THE CONSTITUTIONALITY OF DAMAGE LIMITS IS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. 2

A. CONSTITUTIONAL LIMITS ON LEGISLATIVE POWER TO INFRINGE COMMON LAW RIGHTS ARE AN ISSUE OF FUNDAMENTAL IMPORTANCE. 3

B. THIS COURT SHOULD DETERMINE WHETHER DUE PROCESS FORBIDS INFRINGEMENT OF IMPORTANT COMMON LAW RIGHTS WITHOUT AN ALTERNATIVE REMEDY. 6

C. THIS COURT SHOULD DETERMINE WHETHER LEGISLATIVE DISCRIMINATIONS THAT INFRINGE IMPORTANT COMMON LAW RIGHTS MUST SATISFY HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE. 8

D. THIS COURT SHOULD DETERMINE WHETHER LIMITS ON COMMON LAW RIGHTS WHICH BEAR NO RATIONAL RELATIONSHIP TO LEGITIMATE STATE OBJECTIVES ARE ARBITRARY AND CAPRICIOUS. 10

II. THERE IS A CLEAR DIVISION OF AUTHORITY BETWEEN FEDERAL AND STATE COURTS AND AMONG STATE COURTS REGARDING THE CONSTITUTIONALITY OF DAMAGE LIMITS UNDER THE FOURTEENTH AMENDMENT. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) 4, 11
Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) 4, 13
Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 13
Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) 4
Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) ..9
Carson v. Maurer, 424 A.2d 825 (N.H. 1980) 13
City of Cleburne v. Cleburne Living Center, 437 U.S. 432 (1985) 10
Coburn v. Agustin, 627 F. Supp. 983 (D. Kan. 1985) 6
Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) 13
Dimick v. Schiedt, 293 U.S. 474 (1953) 9
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 4, 7
Etheridge v. Medical Center Hospitals, 376 S.E.2d 525 (Va. 1989) 13
Fein v. Permanente Medical Group, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892 (1985) 6, 8
Ferguson v. Garmon, 643 F. Supp. 335 (D. Kan. 1986) 6
Hoem v. State, 756 P.2d 780 (Wyo. 1988) 4
Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) 13
Ingraham v. Wright, 430 U.S. 651 (1977) 3
Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980) ... 13
Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) 3
Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) 3, 13
Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) 13
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 3
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 10
Meyer v. Nebraska, 262 U.S. 390 (1923) 3
Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885) 4
Moore v. Mobile Infirmary Association, 592 So. 2d 156 (Ala. 1991) 9, 13
Morris v. Savoy, 576 N.E.2d 765, 771 (Ohio 1991) 12

New York Central R. Co. v. White, 243 U.S. 188 (1917).....7
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) ...4
Reynolds v. Porter, 760 P.2d 816 (Okla. 1988) 4
San Antonio Independent School Dist. v. Rodriguez,
411 U.S. 1 (1972) 9
Smith v. Department of Insurance, 507 So. 2d 1080
(Fla. 1987) 3, 6, 9, 13
Sophie v. Fibreboard Corp., 771 P.2d 711
(Wash. 1989) 9, 13
United States Dept. of Agriculture v. Moreno,
413 U.S. 528 (1973).....11

Constitutions, Statutes, and Rules

U.S. Const., amend XIV ..... passim
Mo. Rev. Stat. § 538.210.1(1986).....2

Other Authorities

Coke, Second Institute (4th ed. 1671) 3

General Accounting Office, Medical Malpractice:
Characteristics of Claims Closed in 1984 50 (1987) 11

Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection*,
86 Harv. L. Rev. 1 (1972) 8

Insurance Services Office, Claim Evaluation Impact,
National Overview 4 (1987) 12

Note, *Constitutional Guarantees of a Certain Remedy*,
49 Iowa L. Rev. 1202 (1964) 3

Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*,
38 Okla. L. Rev. 195 (1985).....5

Taylor and Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. Rich. L. Rev. 799 (1982) 5

Thomas, *The Medical Malpractice "Crisis" : A Critical Examination of a Public Debate*, 65 Temple L. Rev. 458 (1992) 4, 12

Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81 (1987).....5

Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141(1988) 5

IN THE

Supreme Court of the United States

October Term, 1992

No. 92-533

NICOLE ADAMS, et al.
Petitioners,

v.

CHILDREN'S MERCY HOSPITAL, et al.
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Missouri

---

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief of Amicus Curiae in support of the Petitioner in this case. Letters of consent by the parties have been filed with this Court.

ATLA is a voluntary national bar association whose 60,000 members primarily represent injured plaintiffs, including many victims of medical negligence. The common law has long provided these victims with the right to seek

compensation for wrongful injury. It has also been a powerful incentive for safe medicine.

The past two decades have seen the enactment of statutes in many states limiting the common-law rights of tort victims in the name of "tort reform." These include limitations on damages recoverable in medical negligence cases. The beneficiaries of these statutes -- medical care providers and their malpractice insurers -- are powerfully represented in the halls of the legislatures. Those whose rights are bargained away -- future victims of negligence -- are necessarily unknown. ATLA has served as their voice in legislatures and the courts, seeking to preserve the right to seek redress for wrongful injury that has been the cornerstone of our civil justice system for 200 years.

REASONS FOR GRANTING THE WRIT

The Questions Presented by the Petitioner seek a determination of whether the "cap" on damages imposed by Mo. Rev. Stat. § 538.210.1(1986) violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This Court has not heretofore addressed itself to the merits of these issues. As a result, federal and state courts have reached divergent results on these important federal questions. Amicus suggests that the Petition amply satisfies two of the reasons set forth in Supreme Court Rule 10 for which the Court will grant a petition for certiorari.

I. THE CONSTITUTIONALITY OF DAMAGE LIMITS IS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The importance of the questions presented in the Petition can scarcely be overstated. Their impact reaches far beyond the parties, beyond those affected by the Missouri statute, and

even beyond the nationwide controversy concerning "tort reform." At issue is whether the United States Constitution imposes any limit on the power of legislative majorities to curtail important common-law rights.

A. CONSTITUTIONAL LIMITS ON LEGISLATIVE POWER TO INFRINGE COMMON LAW RIGHTS ARE AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The common-law right to seek redress in the courts for wrongful injury holds a special place in our civil justice system. Common-law rights were not created by legislatures and are not a matter of legislative grace. Indeed, they preceed even the Constitution. Lord Coke traced this right to the Magna Carta.[1] Justice Powell observed that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v.*

---

[1]Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay. Coke, Second Institute 55-56 (4th ed. 1671).

This formulation has become the basis for provisions in thirty-seven state constitutions. Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964). Courts have struck down limits on medical malpractice damages as violative of this guarantee. *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Subsequently, this Court located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). This Court has recognized that statutory limits on tort damages implicate this central common-law right and are subject to Fourteenth Amendment constraints. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-87, 91-93 (1978). The Court did not find it necessary to demark those constitutional limits. *Id.* at 88. Nevertheless, Justice Marshall, with a certain prescience, later remarked:

> [O]ur cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980)(Marshall, J., concurring).

The importance of this issue is underscored not only by the value of the common-law right abridged, but also by the its impact on a substantial number of Americans. The Missouri statute is not an isolated instance of legislative initiative. In the mid-1980's, health care providers in Missouri and across most of the country experienced a sharp increase in their malpractice liability insurance premiums. Whether this increase amounted to a "crisis" that threatened the availability and affordability of heath care services was, in the lower court's words, "a debatable proposition." *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 904 (Mo. 1992).[2]

---

[2]Other courts have found the evidence of a malpractice insurance crisis dubious at best. *Arneson v Olson*, 270 N.W.2d 125, 136 (N.D. 1978); *Reynolds v. Porter*, 760 P.2d 816, 824 (Okla. 1988); *Hoem v. State*, 756 P.2d 780, 784 (Wyo. 1988). *Boucher v. Sayeed*, 459 A.2d 87, 93 (R.I. 1983). For a critical examination of assertions made by tort reform advocates, see Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 Temple L. Rev. 458 (1992).

Nonetheless, health care providers and their liability insurers mounted a well-financed and highly organized effort to promote "tort reform" as a cure for high premiums.[3] Virtually every state legislature adopted measures restricting the rights of plaintiffs. Twenty-two states, including Missouri, imposed limits on damages recoverable in medical malpractice suits.[4]

A cap on damages is the most egregious affront to the right to redress. It takes effect only after the jury has found the defendant liable and has made the factual determination of damages on the basis of the evidence. In effect, the statute requires the judge to disregard the evidence and issue a rebate to the defendant in the amount of damages above the statutory limit. The constitutionality of such measures is a question that directly affects the citizens and health care providers of nearly half the states and will impact all states that have addressed the perceived liability insurance crisis in ways that tread upon common-law rights.

The Petition does not ask this Court to determine the existence of an insurance crisis. Nor is the wisdom of the

---

[3]*See, e.g.*, Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 195, 196-99 (1985); Taylor and Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. Rich. L. Rev. 799, 813 (1982). The tort reform effort generally has been criticized as an exercise in "raw interest group politics." Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988); *see also* Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81, 96 (1987).

[4]Amicus will not burden this Court with repetition of the extensive citation to state enactments at Petition, 11-12 n.8.

legislature's response at issue.[5] However, the authority that the people have granted to legislators, while broad, is not unbounded. The question of whether a cap on noneconomic damages transgresses those bounds was presented to this Court previously, but the Court did not address the merits of the constitutional issues on that occasion. *Fein v. Permanente Medical Group*, 695 P.2d 665, *appeal dismissed*, 474 U.S. 892 (1985).

Few issues can be said to have greater importance to Americans than the availability and affordability of quality health care. In attempting to address a perceived tension between this interest and common-law rights, legislatures and courts should not be in the position of guessing at the constitutional limits of legislative action.[6] Defining these limits raises several specific constitutional questions which this Court has not, but should, resolve.

B. THIS COURT SHOULD DETERMINE WHETHER DUE PROCESS FORBIDS INFRINGEMENT OF IMPORTANT COMMON LAW RIGHTS WITHOUT AN ALTERNATIVE REMEDY.

---

[5]For this reason, the distinction between economic and noneconomic damages is not constitutionally significant. At issue is whether the legislature may take away what would otherwise be a vested property interest in a valid judgment. Similarly, the amount of the cap is not at issue. As one court has pointed out, if the legislature has the power to impose a cap, it has the power to set it at $450,000 or at $1. *Smith v. Department of Insurance*, 507 So. 2d 1080, 1089 (Fla. 1987).

[6]Even the Court's bare dismissal in Fein has given rise to divergent interpretations by federal courts. *Compare Coburn v. Agustin*, 627 F. Supp. 983, 993 (D. Kan. 1985)(stating that the dismissal indicates only the Supreme Court's approval of the judgment below), with *Ferguson v. Garmon*, 643 F. Supp. 335, 340 (D. Kan. 1986)(construing the dismissal as the Court's endorsement of both the reasoning and result of the California Supreme Court).

The common-law right to sue in tort for wrongful injury stands apart from those rights which are conferred by, and can therefore be withdrawn by, the legislature. An early example is the abolition, under workers' compensation statutes, of tort suits by employees against employers for job injuries. In *New York Central R. Co. v. White*, 243 U.S. 188 (1917), this Court suggested that due process might preclude a state from abolishing common-law rights of action "without providing a reasonably just substitute." *Id.* at 201. The Court found that the statute's non-fault compensation scheme, which removed several tort defenses against recovery, constituted an adequate alternative. *Id.*

The proposition that the Due Process Clause requires such a *quid pro quo* was again before this Court in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), in the context of a statutory limit on recoverable damages due to a nuclear plant accident. However the statute also provided a "panoply of remedies and guarantees," including imposition of a form of strict liability and an expedited recovery scheme. Though the Court raised the issue of whether such a *quid pro quo* was an essential element of due process, the Court stated:

> [W]e need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

Id. at 88.

This issue was once again raised in *Fein*, where the California court had upheld a cap on noneconomic damages in medical malpractice cases. Justice White, dissenting from the dismissal of the appeal framed the issue squarely:

> Whether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is

> dividing the appellate and highest courts of several states. the issue is important, and is deserving of this Court's review.

Fein v. Permanente Medical Group, 474 U.S. 892, 894-95 (1985)(White, J., dissenting).

C. THIS COURT SHOULD DETERMINE WHETHER LEGISLATIVE DISCRIMINATIONS THAT INFRINGE IMPORTANT COMMON LAW RIGHTS MUST SATISFY HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

On its face, the Missouri statute implicates the Equal Protection Clause. Only those injured by negligent health care providers are subject to the cap; plaintiffs in all other tort cases may obtain the full amount of compensation awarded by the finder of fact. In addition, the statute discriminates against the most severely injured victims; claimants whose damages are within the limitation receive the full jury award.

This Court's equal protection cases have developed a tiered analysis. Most economic regulation will pass constitutional muster if there exists a rational relationship between the legislative distinction and legitimate state ends. Those which impinge upon fundamental rights or discriminate against a suspect class must satisfy strict scrutiny. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Amicus submits that a cap on tort damages cannot be viewed as mere economic regulation simply because it affects monetary compensation -- any more than a poll tax or tax on interstate travel could be merely economic. The proper focus must be on the nature of the right burdened.

This Court's own explication of its equal protection doctrine states:

> [T]he Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1972). A right must be deemed "fundamental" for equal protection purposes, if it is "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33. Amicus suggests that limitations on damages clearly infringe upon the right to trial by jury explicitly guaranteed by the Seventh Amendment.

Few principles of the common law are as firmly rooted and widely embraced in America as the broad discretion of juries to make factual determinations in civil cases. It is an "essential characteristic" of the federal system under the influence -- if not the command -- of the Seventh Amendment. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958). This Court has stated:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953).

It is persuasive that the highest courts of three states have invalidated caps on noneconomic damages in medical malpractice cases as violative of state constitutional guarantees of trial by jury. *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Sophie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

The question of whether caps on damages, which directly countermand findings of fact by juries, warrant heightened

scrutiny is an important question which this Court should decide.

D. THIS COURT SHOULD DETERMINE WHETHER LIMITS ON COMMON LAW RIGHTS WHICH BEAR NO RATIONAL RELATIONSHIP TO LEGITIMATE STATE OBJECTIVES ARE ARBITRARY AND CAPRICIOUS.

Even under the minimal rational basis test, the lower court's decision in favor of the validity of the statute raises important questions. The rational basis test, while deferential to legislative judgments, is not toothless. This Court has indicated that something more is required of legislation beyond a legitimate state objective and the conclusory recitation that the provisions will achieve that goal.

An instructive application of the rational basis test by the Court is *City of Cleburne v. Cleburne Living Center*, 437 U.S. 432 (1985). At issue was a special zoning requirement that effectively barred a house for the handicapped from a residential location. The municipality advanced several separate justifications for the restriction, including prevention of crowding, fire protection, proximity to a school, and protection of the patients themselves. In the abstract, it would appear that the zoning restriction would have been a valid step in furtherance of any of these justifications. However, the Court found that under the circumstances under which the ordinance would operate, there was no rational basis for the council to believe that the restriction would serve its stated purposes. *Id.* at 449-50.

Indeed, the Court has repeatedly insisted that the rational relationship between legislative means and ends exist in the real world, as well as on paper. *See, e.g. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (striking down a tax preference for in-state insurers, since the manner in which

insurers actually operate made it irrational to believe that it would foster domestic companies); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down denial of food stamps to households composed of unrelated persons, finding that the "practical operation" of the regulation was not rationally based).

The goal of the Missouri statute was to safeguard the affordability and availability of health care services to residents of the state. *Adams*, 832 S.W.2d at 904. The lower court recognized that the link between capping damages and this goal rested on three premises: First, that the cap "would reduce the aggregate amount of damage awards for medical malpractice; second, that this would "reduce malpractice insurance premiums; and third, that physicians would be willing to continue 'high risk' medical practices in Missouri and provide quality medical services at a less expensive level." *Id.*

However, the court did not inquire whether there was a basis in fact that would lead a reasonable legislator to reasonably expect that limiting damages would accomplish any, let alone all three, essential steps. There does not appear to have been any knowledge of how many jury awards of noneconomic damages in exceess of the cap had been issued by Missouri juries in medical malpractice cases, or their aggregate amount. Nationally, such verdicts are relatively infrequent. A General Accounting Office study of the claims closed by malpractice liability insurers in 1984 found that of 73,472 claims closed, only 14,995 contained payments for noneconomic damages, and only 321 of those were payments greater than $200,000. General Accounting Office, Medical Malpractice: Characteristics of Claims Closed in 1984, at 50 (1987). A study by the Insurance Services Office, the industry's rate advisory body, evaluated the effects of various tort reforms, including a $250,000 cap on noneconomic damages, on a sampling of liability situations. The study found that, in general, the savings from tort reform ranged

from "marginal to nonexistent." Insurance Services Office, Claim Evaluation Impact, National Overview 4 (1987). The cap on noneconomic damages resulted in no savings in most situations. *Id.* at 75.[7]

Even if a damage ceiling would reduce the aggregate pay-out by insurers, there is no provision that would require those carriers to pass on the savings to their insureds. Nor is there any rational determination that those savings would have a significant effect on physicians' decisions to continue practice[8] or would reduce medical costs in any significant way.[9] Finally, it does not appear reasonable to further the availability of quality of medical care by conferring a benefit on those few providers who have been found negligent.

Amicus suggests that judicial review of the basis in reality of a purported nexus between legislative means and ends is an issue that this Court should address.

---

[7]On this basis, one state court concluded that a cap on noneconomic damages in medical malpractice cases was arbitrary and unreasonable. *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991)(citing ISO study).

[8]Liability insurance premiums, while substantial, generally average about 5% of physician income. Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 Temple L. Rev. 459, 496 (1992).

[9]Medical malpractice insurance premiums constitute less than 1% of total medical costs. Thomas, *supra*, at 497.

II. THERE IS A CLEAR DIVISION OF AUTHORITY BETWEEN FEDERAL AND STATE COURTS AND AMONG STATE COURTS REGARDING THE CONSTITUTIONALITY OF DAMAGE LIMITS UNDER THE FOURTEENTH AMENDMENT.

In the absence of clear direction from this Court, state and federal courts have addressed the constitutionality of damage caps with widely divergent results. Four federal courts of appeals have held that limits on damages in medical malpractice actions do not violate federal Due Process or Equal Protection guarantees. *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985). Several state supreme courts have reached similar conclusions. *E.g., Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980); *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989). Other state supreme courts, however, have concluded that damage caps violate the Fourteenth Amendment. *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).[10]

A significant number of state courts have struck down malpractice damage limits as violative of the guarantees of their state constitutions. *See, e.g., Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sophie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). While our federalist system permits, even encourages states to afford their citizens greater constitutional protections than the minimum demanded by the U.S. Constitution, courts and legislatures

---

[10]The split in authority among federal and state courts is set forth with greater specificity in the Petition at notes 4-7.

legislatures should not be in the position of guessing where the federal floor might be.

CONCLUSION

For the above reasons, amicus urges this Court to grant the Petition.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., NW
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae

October 26, 1992